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**IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
FIFTH APPELLATE DISTRICT**

In re R.M., a Person Coming Under the Juvenile
Court Law.

KERN COUNTY DEPARTMENT OF HUMAN
SERVICES,

Plaintiff and Respondent,

v.

A.M.,

Defendant and Appellant.

F058882

(Super. Ct. No. JD119184-00)

OPINION

THE COURT*

APPEAL from an order of the Superior Court of Kern County. Peter A.
Warmerdam, Commissioner.

Mara Carman, under appointment by the Court of Appeal, for Defendant and
Appellant.

Theresa A. Goldner, County Counsel, and Arthur H. Curran III, Deputy County
Counsel, for Plaintiff and Respondent.

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* Before Levy, A.P.J., Cornell, J., and Gomes, J.

A.M. (mother) appeals from an order terminating parental rights (Welf. & Inst. Code, § 366.26) to her one-year-old daughter R.¹ Mother contends the court abused its discretion by denying her petition to regain custody. On review, we affirm.

PROCEDURAL AND FACTUAL HISTORY

At the time R. was born in October 2008, mother had lost custody of nine other children due to her mental health and substance abuse problems. She had an untreated depressive disorder and an approximate 20-year history of drug abuse, including her use of methamphetamines for the past 13 years. Despite reunification services in 2006 and 2007 for the first eight children, mother failed to complete any aspect of her case plan and thus failed to reunify with them. Soon thereafter, mother gave birth to her ninth child; this newborn suffered in-utero drug exposure. Mother was denied services in the ninth child's dependency. Under these circumstances, respondent Kern County Department of Human Services (department) detained R., while she remained in a hospital neo-natal unit, and initiated these dependency proceedings.

In November 2008, the Kern County Superior Court exercised its dependency jurisdiction over R. (§ 300, subds. (b) & (j)), adjudged her a juvenile dependent, and removed her from parental custody. The court also ordered reunification services for mother apparently because she was making some effort, though minimal progress, towards mitigating the problems resulting in R.'s out-of-home placement. Court-ordered services included both substance abuse and mental health counseling, random drug testing, and one-hour weekly supervised visits with R.

On the same day as the November 2008 jurisdictional/dispositional hearing, one-month old R. was placed in a foster home where she has since remained. The court subsequently designated the foster parents as R.'s defacto parents.

¹ All statutory references are to the Welfare and Institutions Code unless otherwise indicated.

Failed Reunification Efforts

Mother initially complied with court-ordered services. Over time, however, her participation and compliance were intermittent. She began failing to drug test in November 2008, only to test positive for amphetamine and methamphetamine on three occasions in December 2008 and January 2009. Her social worker urged her in January 2009 to speak with her substance abuse counselor in order to obtain a higher level of care, including possible in-patient drug treatment. Later that month, however, mother was arrested on drug-related charges and spent approximately one month in jail based on additional charges predating R.'s birth. Meanwhile, mother was discharged from substance abuse counseling due to her numerous unexcused absences.

It took mother a month or so following her jail release to find her way back into counseling. She enrolled in an adult school substance abuse class. However, the class did not meet the level of treatment to which she had been previously referred. She also attended relapse prevention and support classes. Meanwhile, mother either tested positive for amphetamines and methamphetamines or failed to test, resulting in presumptively positive results. By April 2009, her mental health counselor and the gatekeeper for her substance abuse treatment were making efforts to place her in a higher level of care, including possible inpatient treatment. Mother eventually entered a 45-day inpatient program in mid-April which she completed. The day she entered the program, she tested positive for methamphetamine. She had one more positive drug test after being involved in inpatient treatment. While in the program, mother made "satisfactory progress" and showed a "medium degree of interest."

Six-Month Status Review

The department recommended the court terminate services given that R. was less than three years of age when she entered foster care and mother failed to participate regularly and make substantive progress in the court-ordered treatment plan. (§ 366.21,

subd. (e).) At the six-month status review hearing postponed until June 2009, mother asked the court to give her another six months within which to complete the reunification plan.

Mother testified she previously completed an inpatient program, apparently three years earlier, but this time was different. She had now learned what the triggers were for her drug abuse. Over the years, she had been in at least five different substance abuse programs. As of the June hearing date, mother had roughly six weeks of clean drug tests.

The court continued R.'s out of home placement and terminated reunification services. Not only was there clear and convincing evidence that mother failed to participate regularly and make substantive progress in the court-ordered treatment plan, there was not a substantial probability that R. might be placed with mother within an additional six months. Having so ruled, the court set a section 366.26 hearing to select and implement a permanent plan for R. and gave mother notice of her writ remedy. Mother did not challenge the court's decision by way of a writ proceeding in this court.

Mother's Section 388 Petition

Two and a half months later, mother's counsel filed a modification petition under section 388 requesting the court place R. in the mother's care with family maintenance services. According to the petition, mother had almost finished an outpatient substance abuse program she entered after completing her inpatient treatment, was participating in counseling, and was testing clean. Mother felt placement was in R.'s best interests and dearly loved the child. The court set the matter for hearing in conjunction with the section 366.26 hearing.

Social worker Natalie Cruz, who was assigned to the case after the court terminated services, subsequently authored a report recommending the court grant mother's request. As Cruz analyzed the case, mother was actively participating and doing excellently in counseling for substance abuse and relapse prevention. Her expected

completion date was January 2010. She had remained clean of illegal substances since May 2009. Mother was also participating in mental health counseling. Therefore, Cruz claimed, the petition should be granted.

Adoption Assessment

In the meantime, Cruz prepared a report in which she and the department recommended the court find R. likely to be adopted and order parental rights terminated. This recommendation was based on an adoption assessment prepared by Beatriz Martinez, an adoption social worker with the county adoption agency. Because it is undisputed that R. is likely to be adopted, we do not summarize the supporting evidence here.

According to the adoption assessment, R. lived with her defacto parents for all but the first month of her life and never lived with mother. The defacto parents were committed to adopting R. They were considered the child's prospective adoptive parents.

In addition, mother had visited with R. 37 out of a possible 44 times. The visits, which were supervised and scheduled for one hour a week, were summarized in pleasant terms. During the first several months of visits, R. slept during much of the visits. As time passed, R. became more alert and appeared comfortable and happy. Mother's interactions with R. were appropriate. Although visits had been consistent, there was no mother and daughter relationship between mother and R. There was a visiting relationship at best and not significant enough that R. would suffer trauma if rights were terminated. Meanwhile, R. and her defacto parents had formed a strong attachment to one another.

Combined Sections 388 and 366.26 Hearing

The court eventually conducted a combined hearing in November 2009. On the hearing's eve, the department, through its social worker Cruz, filed a supplemental report updating the court on mother's ongoing progress and two recent visits between mother

and R. The department also expressed concern, based on mother's substantial history of substance abuse - dating back to when she was 13 years old - and her six months of negative drug tests, that she had not demonstrated she could maintain long term sobriety. The department urged the court to deny mother's petition and terminate parental rights.

At the hearing, mother's counsel called social worker Cruz as a witness. Cruz's personal opinion remained that mother had made enough progress so that her section 388 petition should be granted. However, that was not the department's opinion after discussions between Cruz, her supervisor, the placement worker, the adoption worker, and the adoption supervisor. According to the others, mother needed to at least complete her program and demonstrate a longer period of sobriety.

When Cruz originally recommended granting the petition, she had not consulted with the adoption social worker. Cruz acknowledged the others had as much hands-on experience with this case as she did. In reaching her conclusion, Cruz "went through the judicial history and, of course, through the DSL [Delivered Service Log], reading through contacts and visitation and also investigating [mother's] progress" The DSL was not offered into evidence.

Cruz further testified she had not supervised any visits between mother and R. and had not seen R. in her foster home. The social worker also had not spoken with R.'s caregivers. By contrast, she met with mother at least a couple times a week. Cruz based her decision, "that this was in her best interests, ... on the mother's progress and some positive visits."²

Mother testified she had been using illegal substances since 2004 and until April 2009, not since she was 13 years old. She also described her recent efforts to improve

² No one clarified Cruz's reference to "her," that is, whether the social worker was referring to the child or mother.

her circumstances. Regardless of whether R. came to live with her, mother was going to continue her efforts. Mother was “doing this” for herself.

Mother described R. as a very happy baby. During visits, R. sometimes opened up her arms to mother, but did so “more when she sees food.” Mother could comfort R. when she cried and had fed her as well as rocked her to sleep during visits. Overall, the visits had “gone pretty well.” R. did not cry at the end of visits. Mother believed it would be in R.’s best interests to be placed with her.

Mother also stated she was the one who asked for residential treatment starting in January 2009. She further claimed she had never been in treatment before the 45-day program in April and May 2009.

R.’s defacto and prospective adoptive mother testified the child had two medical issues: a congenital heart defect and Gerd, a digestive problem. R. was born with a significant size hole in the upper left chamber of her heart. The hole was gradually closing but there was the possibility of surgery if the hole remained the size it currently was. In addition, R. was on medication for her digestive problem but was able to eat regular foods. Her intake, however, had to be watched. Also, after eating, R. needed to be propped up and remain calm for two hours so that she did not throw up her food before she could bounce around and play.

Martinez, the adoption social worker, was the last witness to testify. She had been assigned to R.’s case for “maybe” a little more than six months. Martinez was not originally consulted regarding what the department’s position should be regarding the mother’s modification petition. Had she been consulted, she would not have supported placing R. with mother. Martinez believed it would not be in R.’s best interest to be placed with mother. The adoption social worker based her opinion on mother’s history, the fact she had not completed her programs, and the fact that R. had been in her current home for most of her life so that it would be traumatic for R. to be moved.

Finally, mother's counsel made an offer of proof accepted by the other parties and the court. Counsel stated mother "would be eligible to finish her substance abuse in, I believe, two weeks."

In closing argument on the modification petition, mother's counsel urged that the evidence and the opinion of Cruz supported a finding that mother's circumstances had changed such that R. should be placed in mother's care. Counsel closed her argument by alternatively asking the court to order family reunification services for mother and give her additional time to complete services.

The court found, having reviewed and summarized mother's history, that she was "a substantially changed woman." However, the question before the court was a two-fold one. Although mother's circumstances had changed, she also had to show it would be in the child's best interest to be returned to mother. While the judge had a "wonderful six months to look at, I have a much more dismal period of years to look at."

"In considering this child's best interest, I conclude that it is not in the child's best interest to take the risk that I see associated with placing the child with the mother, rather than the certainty of maintaining the child in the present home. Had the mother been able to put herself in this position by May or June of this year when the [section 366.21, subd. (e) hearing] was heard, we wouldn't have had any of these discussions, and this child would have certainly, under the law, been returned to her.

"But the law as it applies to this situation is different at this particular point in time. [S]o the 388 is denied."

The court thereafter found R. was likely to be adopted and ordered parental rights terminated.

DISCUSSION

I. Preliminary Matter

During the pendency of this appeal, mother's appellate counsel asked this court to augment the record with the department's DSL of all contacts, services and visits from

May 5, 2009, to October 12, 2009, for R. Counsel did not claim the DSL had been part of the record before the trial court. Instead, she argued it was part of the basis for the social worker's opinion and was germane to an argument, which mother now makes, that the requested return of custody was in R.'s best interest.

Although this court ordered the augmentation as requested, we added that our order did not resolve whether this court might consider the augmented DSL in reviewing appellant's claim of error. Citing *People v. Chi Ko Wong* (1976) 18 Cal.3d 698, 711-712 (*Chi Ko Wong*), this court directed the parties to address the issue in their briefs which they have since done.

Chi Ko Wong, supra, 18 Cal.3d at pages 711-712, stands for the well-established rule that an appellate court will not consider matters that were not presented to the trial court. In other words, the appellate record is limited to those matters presented to the trial court.

Mother attempts to distinguish the precise issue raised in *People v. Chi Ko Wong* from her effort here. In so doing, she misses the point. As even she admits, it is settled law that matters not before the trial court may not be considered by the appellate court on review.

In addition, she points out that portions of the visitation logs were set forth in the department's section 366.26 reports. This boot-strapping argument is not persuasive either. The fact that both Cruz and Martinez excerpted some visitation summaries in their reports does not mean the entire DSL for the period mother sought was before the trial court.

Regardless of what the DSL may or may not show, it was not before the trial court when it ruled on mother's section 388 petition. Therefore, this court will not consider it on review. (*Chi Ko Wong, supra*, 18 Cal.3d at pp. 711-712.)

II. Denial of Mother's Section 388 Petition

A parent may petition the court to modify a prior order based on a change of circumstance or new evidence. (§ 388, subd. (a).) The parent, however, must also show that the proposed change would promote the best interests of the child. (*In re Stephanie M.* (1994) 7 Cal.4th 295, 318 (*Stephanie M.*).)

Whether the juvenile court should modify a previously made order rests within its discretion and its determination may not be disturbed unless there has been a clear abuse of discretion. (*Stephanie M., supra*, at p. 318.) When two or more inferences can reasonably be deduced from the facts, the reviewing court has no authority to substitute its decision for that of the trial court. (*Id.* at pp. 318, 319.)

Here, the court found mother's circumstances were changed but that it would not be in R.'s best interest to grant the relief mother sought. The court's ruling was proper in that mother presented little if any, let alone compelling, evidence to support a best interest finding.

At most, there was mother's belief and social worker Cruz's opinion. Cruz based her apparent best interest opinion on mother's progress and some positive visits. The court properly may have given Cruz's opinion little weight. Mother's progress in overcoming her substance abuse and mental health problems hardly spoke to the child's best interests particularly in light of mother's limited period of sobriety and lengthy history of substance abuse. Additionally, Cruz's limited experience in this case was focused almost entirely on mother, and not on R. Cruz had never supervised a visit between mother and child, much less visited R. in her placement or had contact with the child's defacto parents.

There was also conflicting evidence on the question of R.'s best interest. R. never lived with mother and they did not share a parent/child relationship. R. saw mother a total of approximately 40 hours since the child's detention as a newborn one year earlier.

Meanwhile, R. lived that first year with caregivers who became her defacto parents. To remove R. from their care would be traumatic for R.

Rather than confront her burden of proof to establish best interest, her lack of proof, and the conflicting evidence regarding best interest, mother resorts to attacking the court's reasoning in denying her petition. In the process, she ignores the law that informs our authority, as a reviewing court. Namely, we review the trial court's ruling, not the reasoning behind it. (*Davey v. Southern Pac. Co.* (1897) 116 Cal. 325, 329.)

Alternatively we observe, mother overlooks the law regarding the court's proper focus once a child's dependency reaches the permanency planning stage.

As the California Supreme Court explained in *Stephanie M.*, by the time that point is reached in a dependency proceeding, a parent's interest in the care, custody, and companionship of the child is no longer paramount. Rather, the court's focus shifts to the child's needs for permanency and stability. In fact, there is a rebuttable presumption that continued out-of-home care is in the best interests of the child. A court hearing a modification petition at this stage of the proceedings must recognize this shift of focus in determining the ultimate question before it, that is, the best interests of the child.

(*Stephanie M.*, *supra*, 7 Cal.4th at p. 317.)

Mother did not introduce any evidence that R.'s need for permanency and stability would be advanced by ordering return of custody or at least more time for reunification. Instead, mother on appeal tries to shift the evidentiary burden. She protests that there was no evidence that R. had a special need for permanency and stability or that it would be detrimental to move her. In so doing, she ignores the rebuttable presumption that continued out-of-home care was in R.'s best interest. (*Stephanie M.*, *supra*, 7 Cal.4th at p. 317.) She further overlooks the evidence that a move away from the only home R. had ever known would be traumatizing to the child.

Under these circumstances, we conclude the court did not abuse its discretion by denying mother's petition. There being no other argument raised, we further conclude the court properly proceeded with the section 366.26 hearing and terminated parental rights.

DISPOSITION

The order terminating parental rights is affirmed.